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Attorneys for Defendant  
UNION PACIFIC RAILROAD COMPANY  
(sued herein as UNION PACIFIC CORPORATION)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

FREDERICK N. BURGNER

Plaintiff,

vs.

UNION PACIFIC CORPORATION,

Defendants.

No. C 07 05160 HRL

**AMENDED ANSWER TO  
PLAINTIFF'S SECOND  
AMENDED COMPLAINT;  
DEMAND FOR JURY TRIAL**

Defendant UNION PACIFIC RAILROAD COMPANY (sued herein as UNION PACIFIC CORPORATION and hereinafter referred to as "Defendant") hereby answers the Second Amended Complaint of Plaintiff FREDERICK N. BURGNER (hereinafter "Plaintiff") and state as follows:

**JURISDICTION AND VENUE**

1. Defendant admits Plaintiff purports to seek damages due to employment discrimination in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, et seq.

2. Defendant admits that this Court has subject matter jurisdiction over Plaintiff's

1 claim.

2 3. Defendant admits that the Northern District of California is a proper venue for  
3 Plaintiff to commence this action.

4 4. Defendant admits that this action arises in the County of Santa Clara.

5 **PARTIES**

6 5. Defendant admits that Plaintiff purports to reside in the County of Santa Clara, State  
7 of California.

8 6. Defendant denies that it is a Utah corporation as alleged by Plaintiff.

9 7. Defendant admits that it does business in the County of Santa Clara, State of  
10 California.

11 **FIRST CAUSE OF ACTION**

12 **[Discrimination against Persons who serve in the**  
13 **Uniformed Service- 38 U.S.C § 4311(a)]**

14 8. Defendant is without knowledge or information sufficient to form a belief as to the  
15 truth of the material allegations in Paragraph 8 of Plaintiff's Second Amended Complaint and, on  
16 that basis, denies those allegations.

17 9. Defendant admits that Plaintiff purports that he has been a member of the United  
18 States Military since 1984.

19 10. Defendant admits the allegations contained in Paragraph 10 of Plaintiff's Second  
20 Amended Complaint.

21 11. Defendant admits that Plaintiff purports that he was mobilized with the Army  
22 Reserves in or about July 2004.

23 12. Defendant admits that Plaintiff returned to work in 2005 and that he was reinstated  
24 in the position of trainman. Defendant is without information as to the remaining allegation to form  
25 a conclusion as to their accuracy and, on that basis denies the same.

26 13. Defendant admits that while Plaintiff was mobilized, employees junior to Plaintiff

1 on the trainman's seniority roster were promoted to engine service.

2 14. Defendant admits that Plaintiff requested promotion to engine service. Defendant  
3 is without information as to the remaining allegations to form a conclusion as to their accuracy and,  
4 on that basis denies the same.

5 15. Defendant denies the material allegations in Paragraph 15 of Plaintiff's Second  
6 Amended Complaint.

7 16. Defendant admits that Plaintiff filed a complaint with the Department of Labor  
8 Veterans' Employment and Training Service. Defendant is without information as to the remaining  
9 allegation to form a conclusion as to their accuracy and, on that basis denies the same.

10 17. Defendant is without knowledge or information sufficient to form a belief as to the  
11 truth of the material allegations in Paragraph 17 of Plaintiff's Second Amended Complaint and,  
12 on that basis, denies those allegations.

13 18. Defendant admits the allegations contained in Paragraph 18 of Plaintiff's Second  
14 Amended Complaint.

15 19. Defendant denies the material allegations in Paragraph 19 of Plaintiff's Second  
16 Amended Complaint.

17 20. Defendant denies the material allegations in Paragraph 20 of Plaintiff's Second  
18 Amended Complaint.

19 21. Defendant denies the material allegations in Paragraph 21 of Plaintiff's Second  
20 Amended Complaint.

21 22. Defendant admits that Plaintiff pursued a complaint against Defendant.

22 23. Defendant is without knowledge or information sufficient to form a belief as to the  
23 truth of the material allegations in Paragraph 23 of Plaintiff's Second Amended Complaint and,  
24 on that basis, denies those allegations.

25 24. Defendant denies the material allegations in Paragraph 24 of Plaintiff's Second  
26 Amended Complaint.

25. Defendant denies the material allegations in Paragraph 25 of Plaintiff's Second Amended Complaint.

## SECOND CAUSE OF ACTION

**[Acts of Reprisal- 38 U.S.C. § 4311(b)]**

26. Defendant admits or denies the allegations as previously stated and set forth in paragraphs 1 through 25.

27. Defendant admits the allegations contained in Paragraph 27 of Plaintiff's Second Amended Complaint.

28. Defendant is without knowledge or information sufficient to form a belief as to the truth of the material allegations in Paragraph 28 of Plaintiff's Second Amended Complaint and, on that basis, denies those allegations.

29. Defendant denies the material allegations in Paragraph 29 of Plaintiff's Second Amended Complaint.

30. Defendant admits the allegations contained in Paragraph 30 of Plaintiff's Second Amended Complaint.

31. Defendant admits the allegations contained in Paragraph 31 of Plaintiff's Second Amended Complaint.

32. Defendant denies the material allegations in Paragraph 32 of Plaintiff's Second Amended Complaint.

33. Defendant admits that Plaintiff was the only member of his three-man crew to be terminated for the rules violation.

34. Defendant denies the material allegations in Paragraph 34 of Plaintiff's Second Amended Complaint.

35. Defendant denies the material allegations in Paragraph 35 of Plaintiff's Second Amended Complaint.

36. Defendant denies the material allegations in Paragraph 36 of Plaintiff's Second

1 Amended Complaint.

2 AS AND FOR SEPARATE AND DISTINCT AFFIRMATIVE DEFENSES,  
3 DEFENDANT ALLEGES AS FOLLOWS:

4 1. Defendant alleges that the Complaint fails to state facts sufficient to constitute a  
5 cause of action, or any cause of action, against this answering defendant.

6 2. Defendant alleges that the Complaint fails to state facts sufficient to set forth a  
7 claim for liquidated damages.

8 3. Without admitting any allegation of the Complaint, defendant alleges that, some of  
9 the acts, actions and activities, as alleged, were committed, if at all, by independent, non-affiliated  
10 persons who were not acting on behalf of, or within the course and scope of any relationship with  
11 this answering defendant during the time referred to in the Complaint. Therefore, damages  
12 purportedly sustained by the plaintiff or awarded to the plaintiff, if any, should be apportioned and  
13 reduced, in whole or in part, according to the respective and comparative fault of all parties,  
14 persons and entities, or their agents, servants and employees and representatives who contributed  
15 to or caused the incident alleged in the Complaint.

16 4. Defendant alleges that the plaintiff was careless and negligent in and about the  
17 matter set forth in said Complaint, and that said carelessness and negligence contributed to and  
18 proximately caused any and all damages alleged in said Complaint.

19 5. Defendant alleges that this answering defendant is informed and believes, and on  
20 that ground alleges, that the plaintiff and plaintiff's representatives had knowledge of the acts and  
21 events giving rise to plaintiff's Complaint and consented to such acts and events.

22 6. Defendant alleges that plaintiff has failed to exhaust all available administrative  
23 remedies, and that the claims against this answering defendant must be adjudicated in an  
24 arbitration proceeding pursuant to an agreement amongst the parties.

25 7. Without admitting any allegation of the Complaint, defendant alleges that the  
26 conduct alleged on the part of this answering defendant is privileged pursuant to California law,

1 including but not limited to, California Civil Code Section 47.

2 8. Without admitting any allegation of the Complaint, defendant alleges that this  
3 answering defendant was acting in good faith pursuant to its official duties and is immune from  
4 liability for the conduct alleged in plaintiff's Complaint.

5 9. Defendant alleges that the claims asserted by the plaintiff are barred by the  
6 applicable state and federal statute of limitations and the equitable doctrine of waiver, estoppel and  
7 equitable tolling.

8 10. Without admitting any allegation of the Complaint, defendant alleges that the  
9 conduct of other parties, persons and entitles, including plaintiff, would be primary, direct and  
10 active, while this answering defendant's would be secondary, indirect and passive.

11 11. Without admitting any allegation of the Complaint, defendant alleges that any  
12 injury, damages or loss, if any, sustained by plaintiff, was aggravated by plaintiff's failure to use  
13 reasonable diligence to mitigate and minimize the same.

14 12. Defendant alleges that the plaintiff's damages, if any exist, are subject to a complete  
15 or partial set-off.

16 13. Plaintiff's claim is subject to the Collective Bargaining Agreement between the  
17 defendant and plaintiff's Labor Union and is preempted by the Railway Labor Act.

18 14. Defendant alleges that the allegations in the complaint are "minor" disputes and  
19 must be adjudicated in arbitration proceedings.

20 15. Defendant's employment decision regarding plaintiff's employment was based on  
21 good faith, legitimate lawful purposes.

22 16. Defendant alleges that it would have taken the same employment action regardless  
23 any protected status of the plaintiff.

24 17. This answering defendant would have made the same decision regarding plaintiff's  
25 employment based on information acquired by the defendant after plaintiff's termination.

26 WHEREFORE, DEFENDANT PRAYS FOR JUDGMENT AS FOLLOWS:

1 1. That the Complaint on file herein and each cause of action therein contained be hence  
2 dismissed;

3 2. That Defendant be awarded costs of suit incurred herein, including attorney's fees; and

4 3. For such other and further relief as the Court deems fit and proper under the  
5 circumstances.

6 **DEMAND FOR JURY TRIAL**

7 Defendant UNION PACIFIC RAILROAD COMPANY demands trial by jury in the above-  
8 entitled matter.

9 Dated: February 14, 2008

RANDOLPH CREGGER & CHALFANT LLP

10  
11 By /s/ STEPHANIE L. QUINN  
12 STEPHANIE L. QUINN  
13 Attorneys for Defendant UNION PACIFIC  
14 RAILROAD COMPANY  
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